APPENDIX

Statute Involved

RELEVANT PROVISIONS OF ARTICLE 3A OF THE NEW YORK PERSONAL PROPERTY LAW, ASSIGNMENT OF EARNINGS

§46. Definitions

In this article unless the context or subject matter otherwise requires:

1. "Assignment" means any assignment of or order for payment of any earnings, whether given outright or as security. "Assignment" shall not include a payroll deduction, nor any part of earnings required by law to be withheld in payment of taxes, nor such sums as may be deducted by the employer for payment to a labor union or to a trust fund for the benefit of employees, pursuant to agreement in writing either with the employee or with a labor union of which the employee is a member.

2. "Payroll deductions" means only such sums as an employee may in writing authorize his employer to pay out on the employee's behalf, where the authorization is revocable, and does not purport to create any enforceable right in any third party.

3. "Earnings" means any salary, wages, commissions, or other compensation for services. "Future earnings" means earnings which become payable by an employer, to the assignor or persons claiming under him, after the execution of the instrument of assignment .

4. "Indebtedness" means any obligation to pay money, whether as principal, guarantor or surety, including such

obligations arising out of loans, purchases of real or personal property, services rendered, or any other transaction whatsoever.

5. "Employer" means any person owing earnings to an assignor, whether such earnings were due when the assignment was executed, or later became due, and whether the employment was existing when an assignment was made, or did not commence until later.

6. "Assignor" means one who executes an assignment.

7. "Assignee" means one to whom any sum is payable under an assignment.

8. "Garnishment" means any levy on execution, attachment, sequestration, proceedings to enforce a judgment or other legal process by which a creditor or other claimant to any portion of an employee's earnings stops payment by an employer to an employee or obtains payment due the creditor. "Garnishment" shall not include an order for installment payments to a judgment creditor.

§46—a. No implied repeal

Nothing in this article shall be deemed to limit any other statutory provision. Any express statutory provision, in force at the time this article takes effect, and which is inconsistent with any provision of this article, shall prevail.

§46—b. Assignments of future earnings collectible only as prescribed

Assignments of future earnings shall be collectible only as prescribed in sections forty-eight to forty-eight-d, inclusive, of this chapter.

§46—c. Formal requisites of assignments of less than one thousands dollars and of assignments securing certain guarantees amounting to fifteen hundred dollars or less

No assignment of future earnings, securing or relating to any indebtedness aggregating less than one thousand dollars, shall be valid for any purpose whatsoever unless:

(a) such assignment shall be contained in a separate written instrument in which all printed matter is in at least eight point type and which shall have written or printed thereon in a size equal to at least ten point bold type the following title: "Assignment of Wages, Salary, Commissions or other Compensation for Services," and shall have written or printed at the bottom thereof just above the place reserved for the signature of the assignor in a size equal to at least ten point bold type the following: "This is an Assignment of Wages, Salary, Commissions or Other Compensation for Services";

(b) such assignment shall, either in its text or in a writing permanently attached thereto, identify specifically and describe fully the transaction to which it relates, said description to include the name and address of the assignee, the identity of the merchandise sold or services rendered or other basis of the indebtedness secured by, or consideration given for the assignment, and the date on and place at which payments are to be made; and on the face or back of the instrument there shall be a summary of sections forty-six-c, forty-six-e, forty-six-f, forty-eight, forty-eight-a, forty-eight-b, forty-eight-c and forty-nine of the personal property law;

(c) such assignment if given as security, is security only for the transaction or series of transactions identified spe-

cifically and described therein, or a renewal thereof, and no other valid and legally enforceable assignment exists in connection with the same transaction or series of transactions; provided, however, that nothing in this paragraph shall invalidate an assignment securing a guarantee of the payment of the purchase price of goods, wares or merchandise amounting to fifteen hundred dollars or less sold for a use other than a commercial or business use, notwithstanding the fact that such assignment secures subsequent transactions in addition to that originally secured, where the liability of the guarantor is limited to a period of two years from the date of the assignment, and where the assignment sets forth the maximum amount for which the guarantor shall be liable; provided further that no assignment of future earnings shall be valid with respect to any transaction or series of transactions for the purchase of goods, wares or merchandise for a price of fifteen hundred dollars or less sold for a use other than a commercial or business use, when such assignment is executed by a guarantor or by one of two or more purchasers, unless such goods are purchased for the common use of the assignor and the purchaser or co-purchaser.

§46—d. Guarantee of certain purchases secured by assignment of earnings

No guarantee given to the seller to secure the payment of goods, wares or merchandise amounting to fifteen hundred dollars or less sold for any use other than a commercial or business use, the payment of which is secured by an assignment of future earnings, shall be valid unless such instrument of guarantee identifies specifically and describes fully the transaction or series of transactions secured. If the instrument of guarantee is given to secure subsequent

transactions in addition to the transaction or series of transactions secured by such assignment, the liability of the guarantor under such instrument of guarantee as to subsequent transactions shall be limited to transactions within a period of two years from the date of its execution, and shall set forth the maximum amount for which the guarantor shall be liable.

Each instrument of guarantee shall be executed in duplicate, and one copy shall be given to the guarantor immediately upon its execution.

§46—e. Personal execution of assignment by assignor; delivery of copies of papers

No assignment of future earnings shall be valid for any purpose whatever unless such assignment is personally executed by the assignor and a copy thereof and of any papers attached thereto together with a copy or copies of any papers executed by the assignor pertaining to the transaction or series of transactions described in the assignment are delivered to the assignor.

§46—f. Limit on interest and other charges

Except as provided in article nine of the banking law, no person shall directly or indirectly receive or accept, whether by discount or otherwise, for the use and sale of his personal credit or for making or continuing any advance or loan of money (1) in anticipation of earnings assigned outright, or (2) on the security of an assignment of any earnings assigned as security, a greater sum than at the rate of eighteen per centum per annum on the amount of such loan or advance, either as a bonus, interest or otherwise, or under the guise of a charge for investigating the status of a person applying for such loan or advance,

or drawing of papers or other service in connection with such loan or advance, except such charges as are now permitted by section 5-531 of the general obligations law. Any assignment, whether outright or as security, which is made wholly or partly in consideration of or as security for a loan or advance which violates this section, shall be void, and invalid for any purpose whatsoever. Every person, firm, corporation, director, agent, officer or member thereof who shall violate any provision of this section, directly or indirectly, or assent to such violation shall be guilty of a misdemeanor.

§47. Public filing of assignment before filing with employer

Except as provided in section forty-nine of this chapter, an assignment of future earnings or a true copy thereof, must be filed with the county clerk as provided for in section forty-seven-a before such assignment or a copy thereof is filed with the assignor's employer.

§47—a. Place of filing

An assignment of future earnings or a true copy thereof authenticated by a notary public or commissioner of deeds, together with an itemized statement setting forth the amount then due the assignee and the date and amount of payments theretofore made upon the indebtedness, may be filed in the office of the county clerk of the county in which the assignor resides at the time of the filing thereof, if he resides within the state, and if he resides without the state or his residence is unknown, in the county where the assignor is employed at the time of the filing thereof. If the assignor is employed without the state and his residence is without the state or is unkown, the assignment or authenticated true copy thereof and accompanying statement may

be filed in the county where the assignor resided at the time of the execution thereof.

§47—b. Filing, entering and indexing

The filing officer shall mark upon the assignment or true copy thereof filed with him the date of its filing and shall file such assignment or true copy thereof in his office for public inspection. He shall keep a separate book in which he shall enter the names of the assignor and assignee, the date of its filing, its filing number and the date of cancellation thereof, or its vacation by order of the court. Such book shall be indexed alphabetically under the names and changed names, if any, of both assignor and assignee. For filing, entering and indexing such assignment or true copy thereof or any assignment of or satisfaction of an assignment or its vacation by order of the court, the filing officer shall be entitled to a fee of fifty cents except in the city of New York where the fee shall be as provided in section fifteen hundred fifty-seven-a of the civil practice act, and in the county of Nassau where the filing officer shall be entitled to a fee of one dollar for filing, entering and indexing the assignment and fifty cents for filing any assignment of or satisfaction of an assignment, or its vacation by order of the court.

§47—c. Refiling.

The filing of assignments shall be valid for a period of two years only. The validity of the filing may in each case be extended for successive additional periods of one year from the date of refiling by filing in the office of the county clerk of the county in which the original assignment or duly authenticated copy thereof was filed a true copy of the original assignment within thirty days next preceding

the expiration of each period, with a statement attached signed and verified by or on behalf of the assignee, setting forth that the assignment is in force and stating the amount remaining unpaid. Such copy, with statement attached, shall be filed and entered in the same manner as an assignment or copy thereof filed and entered for the first time, and the filing officer shall be entitled to a like fee as upon the original filing.

§47—d. Cancellation of assignment

Upon the payment or satisfaction of the indebtedness, and upon written demand delivered personally or by registered mail by the assignor, the assignee shall execute and acknowledge or prove, and deliver to the assignor a certificate setting forth that the indebtedness has been paid or otherwise satisfied and discharged. Such certificate must recite the date of the assignment, the names of the parties thereto, the amount of the original indebtedness, the filing number, the date of filing thereof, including every assignment of said assignment, if any, specifying in the recital of each assignment the date thereof, the names of the parties thereto, the filing date and the serial number thereof.

If for ten days after such demand the assignee fails to mail or deliver such a statement of satisfaction, he shall forfeit to the assignor five dollars, and be liable for all damages suffered. Upon presentation of such statement of satisfaction the filing officer shall file the same and note the cancellation of the assignment and the date thereof on the margin of the page where the assignment has been entered.

§47—e. Vacating of an assignment, by order of a court

1. An assignment may be vacated by a judgment of a court of record upon a special proceeding brought by the assignor, his employer or any person having an interest therein. Before such judgment shall be granted an order to show cause and the petition upon which it was granted shall be served upon the assignee, specifying the grounds upon which such relief is sought and requiring the assignee to show cause, at a time and place specified therein, why the assignment should not be vacated. If the application is made by a person other than the assignor, a copy of the order to show cause and the petition upon which it was granted shall be served upon the assignor, as the court shall direct. Such order shall be returnable at a special term of a court of record in the county where the assignment is filed, if it has been filed, or, whether or not the assignment has been filed, in the county where the assignor resides or the county where the assignee resides, and shall be returnable at a time not less than eight days from the service thereof unless the court to whom the application is made shall find that a greater or lesser time is appropriate in the circumstances.

The order to show cause and the petition upon which it was granted shall be served upon the assignee either (1) by personal service, or (2) by leaving them at his or its place of business with a person of suitable age and discretion with directions to deliver them to the assignee and mailing a copy by certified mail to the assignee directed to the address specified in the assignment or if none is specified in the assignment to his or its last known address, or (3) as the court may direct. Proof of such service shall be made by affidavit. If the assignee is a co-partnership consisting of two or more partners service on one partner shall constitute service on the co-partnership.

2. Upon presentation of a transcript of a judgment pursuant to this section, vacating an assignment, and upon payment of fees provided therefor, a county clerk in whose office the assignment is filed shall file the transcript of the judgment and shall enter on the margin of the page where the assignment is entered, and against the assignment to which the judgment relates, the words "Vacated by order of the court."

3. This section does not enlarge the territorial limits of the jurisdiction of any court.

4. No assignment purporting upon its face or otherwise shown to have been made in compliance with the direction of the court in an action or proceeding in a family court or in a matrimonial action or proceeding in a court of this state shall be vacated by a judgment pursuant to this section.

§48. Notice to be mailed to assignor prior to filing with employer

Except as provided in section forty-nine, no assignment of future earnings shall be filed with the assignor's employer until ten days shall have elapsed after a written notice shall have been mailed to the assignor, addressed to his last known place of residence stating that unless the amounts in default are paid within ten days from the date of the mailing, the assignment will be filed with the assignor's employer; such written notice shall not be mailed by the assignee until at least twenty-one days shall have elapsed after default by the assignor in a payment due on the indebtedness and such written notice shall contain substantially the following language: "Bring this notice with you when making any payment on account of your indebtedness and have the payment endorsed on this notice."

If a payment in any amount is accepted by the assignee after the mailing of said notice and, if the fact of such payment is noted in writing by the assignee at the time of the acceptance of the payment, either upon the notice or upon some other paper bearing a reference to said notice, the assignor shall no longer be considered in default for the purpose of permitting an assignment to be filed with the assignor's employer. In the event, however, of any subsequent default, the assignee may file the assignment upon compliance with the provisions of the preceding paragraph of this section as though no prior default had occurred.

§48—a. Manner of collection; percentage of earnings deductible; restriction against multiple deductions

1. Subject to subdivision two of this section, any assignment of future earnings shall be collectible from the assignor's employer at the time of each payment of such earnings commencing with the first payment thereof made after the expiration of ten days from the date of filing with the employer of a true copy of such assignment, authenticated by a notary public or a commissioner of deeds, together with an itemized statement of the amount then due the assignee, which statement shall set forth the following information (1) the date and amount of each payment theretofore made upon the indebtedness and (2) in case public filing is required, the date upon which such assignment or true copy thereof was filed with the filing officer as described in section forty-seven-a, of this chapter.

2. The following limitations set forth in paragraphs (a), (b) and (c) of this subdivision shall apply to the collection of assignments of future earnings securing or relating to any indebtedness aggregating less than one thousand dollars;

(a) the amount collectible in any month shall not exceed ten per centum of the assignor's future earnings payable in such month;

(b) if at the time of the filing with the employer (1) any other assignment of future earnings is subject to payment, or (2) any garnishment against such earnings or order against the assignor for installment payments to a judgment creditor, is in force, no amount shall be collectible while such other assignment is subject to payment or such garnishment or order is in force;

(c) no portion of future earnings shall be withheld from the assignor or paid to satisfy such assignment in whole or in part while any portion of the indebtedness secured by any valid assignment securing or relating to an indebtedness aggregating less than one thousand dollars, previously filed with the employer in accordance with this section, shall remain unpaid.

3. No portion of future earnings shall be withheld from the assignor or paid to satisfy in whole or in part any subsequent garnishment while any portion of the indebtedness secured by any valid assignment securing or relating to an indebtedness aggregating less than one thousand dollars filed with the employer in accordance with this section shall remain unpaid, but nothing contained herein shall exempt the earnings of a judgment debtor from the application of an order for installment payments to a judgment creditor.

§49—b. Amount of exempt earnings

Notwithstanding anything contained in this article, no portion of the assignor's future earnings shall be withheld by reason of any assignment, unless such earnings amount at least to the sum of thirty dollars per week if the assignor

is employed in a city with a population of two hundred and fifty thousand or more, and at least to the sum of twenty-five dollars per week if the assignor is employed elsewhere.

§48—c. Assignment of future earnings by person unemployed; effect of loss of employment

If the assignor is not employed at the time he makes an assignment of future earnings, but is thereafter employed, his future earnings shall nevertheless become collectible by the assignee as provided in this article upon the filing of the prescribed documents with the employer. No assignment of future earnings shall become invalid by reason of the cessation of employment, or cessation of payment of earnings, but shall continue in effect, and may be applied to the payment of any future earnings from the same or other employment, in accordance with the provisions of this article, so long as the indebtedness secured by the assignment shall remain unpaid in whole or in part. If the assignor is re-employed by the same employer before the expiration of ninety days from the termination of employment, the assignment shall continue to be collectible without further filing of papers. If the employee is re-employed on or after the expiration of such ninety days, the assignment shall again become collectible from the employer as provided in section forty-eight-a only after copies of the assignment and the other documents specified in such section have been filed with the employer following the re-employment.

§48—d. Payroll deductions not included

Payroll deductions may be made by the employer notwithstanding any restriction in this article, and shall be deductible in addition to the payments under any wage assignment permitted by this article; provided however that

in any case where payroll deductions and a payment due under an assignment will more than equal an installment of earnings due, the assignment shall have priority over any payroll deductions.

§49. Certain provisions not applicable to banks, trust companies or credit unions

The provisions of section forty-eight of this chapter in so far as they require any delay or demand by an assignee, before filing with the employer, shall not apply to assignments given either as security for or as a manner or method of the repayment of money actually advanced to or at the request of the assignor by any bank, trust company or credit union doing business in the state of New York, nor shall the requirement of public filing provided in section forty-seven be applicable; provided, however, that every such assignment must have printed on the face thereof the following words: "This assignment is executed as security for, or as a manner or method of the repayment of, money advanced by a bank, trust company or credit union doing business in New York." No assignment, however, received by any bank trust company or credit union pursuant to any agreement between it and a person who has sold merchandise or furnished services to, or at the request of, the assignor, shall be deemed to have been given as security for, or as a manner or method of repayment of, money actually advanced to, or at the request of, the assignor within the meaning of this section.

1974 Amendments

(at this writing, not yet signed by the Governor)

Explanation: Matter in *italics* is new; matter in brackets [ ] is old law to be omitted.

AN ACT

To amend the personal property law and the civil practice law and rules, in relation to wage assignments

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section forty-six-e of the personal property law, as added by chapter eight hundred twenty-three of the laws of nineteen hundred fifty, is hereby amended to read as follows:

§ 46-e. Personal execution of assignment by assignor; delivery of copies of papers. No assignment of future earnings shall be valid for any purpose whatever unless such assignment is personally executed by the assignor [and a]. *A* copy thereof and of any papers attached thereto together with a copy or copies of any papers executed by the assignor pertaining to the transaction or series of transactions described in the assignment [are] *shall be* delivered to the assignor *before such assignment is filed with the employer.*

§ 2. Section forty-seven-e of such law is hereby amended by adding thereto a new subdivision, to be subdivision five, to read as follows:

5. In any proceeding under this section the court shall have jurisdiction to consider any and all defenses to the

assignment and the debt secured thereby. The court may grant such interim relief as may be appropriate. The burden of proving the assignment and the debt secured thereby shall be on the assignee.

§ 3. Section forty-eight of such law, as amended by chapter eight hundred twenty-three of the laws of nineteen hundred fifty, is hereby amended to read as follows:

§ 48. Notice to be mailed to assignor prior to filing with employer. [Except as provided in section forty-nine, no] *1. No* assignment of future earnings shall be filed with the assignor's employer until [ten] *twenty* days shall have elapsed after a written notice shall have been mailed to the assignor *by certified mail, return receipt requested,* addressed to his last known place of residence stating that unless the amounts in default are paid within [ten] *twenty* days from the date of the mailing, the assignment will be filed with the assignor's employer[; such]. *If the aforesaid notice is returned undelivered it may be mailed to the assignor by certified mail, return receipt requested, addressed to the assignor at the address where he is employed or, in the alternative, it may be served in the same manner as a summons.*

Such written notice shall not be mailed by the assignee until at least twenty-one days shall have elapsed after default by the assignor in a payment due on the indebtedness and such written notice shall contain substantially the following language: "Bring this notice with you when making any payment on account of your indebtedness and have the payment endorsed on this notice."

2. If a payment in any amount is accepted by the assignee after the mailing of said notice and if the fact of

such payment is noted in writing by the assignee at the time of the acceptance of the payment, either upon the notice or upon some other paper bearing a reference to said notice, the assignor shall no longer be considered in default for the purpose of permitting an assignment to be filed with the assignor's employer. In the event, however, of any subsequent default, the assignee may file the assignment upon compliance with the provisions of the preceding paragraph of this section as though no prior default had occurred.

3. The written notice required by subdivision one of this section shall be accompanied by copies of the papers required to be delivered by section forty-six-e of this article and by a written notice which shall contain substantially the following language:

"If you believe that you have a defense to the aforesaid wage assignment or the debt secured thereby you are entitled to follow either of the following procedures designed as (a) and (b).

(a) You are entitled to a hearing before a court of record in accordance with the provisions of section forty-seven-e of the personal property law which reads as follows:

(insert provisions of section forty-seven-e of the personal property law)

(b) Within ten days after receipt of the aforesaid notice, you are entitled to mail to the assignee, by certified mail return receipt requested, a written notice containing your name, residence address and substantially the following language:

'I (insert name) residing at (insert address) hereby affirm that I have a bona fide defense to the claim in your notice dated (insert date of notice) and to the wage assignment given as security therefor, based upon the following facts (state the facts constituting the basis of your defense)'"

4. Upon receipt of such notice the assignee shall be precluded upon filing such wage assignment with the employer until it obtains an order of a court of record authorizing such filing. The assignee shall be entitled to institute a special proceeding in a court of record to obtain such an order. At least eight days' notice of the application for such order shall be given to the assignor in the manner prescribed in subdivision one of this section and if a hearing is held the assignor shall have all the rights prescribed by section forty-seven-e of this article.

§ 4. Section forty-nine of such law, as added by chapter eight hundred twenty-three of the laws of nineteen hundred fifty, is hereby amended to read as follows:

§ 49. Certain provisions not applicable to banks, trust companies or credit unions. *1. The provisions of section forty-seven of this article shall not be applicable to any bank, trust company or credit union doing business in the state of New York.*

2. The provisions of section forty-eight of this [chapter] *article* in so far as they require any delay [or demand] by an assignee, before filing with the employer, shall not apply to assignments given either as security for or as a manner or method of the repayment of money actually advanced to or at the request of the assignor by any bank, trust company or credit union doing business in the

state of New York[, nor shall the requirement of public filing provided in section forty-seven be applicable]; provided, however, that every such assignment must have printed on the face thereof the following words: "This assignment is executed as security for, or as a manner or method of the repayment of, money advanced by a bank, trust company or credit union doing business in New York." No assignment, however, received by any bank, trust company or credit union pursuant to any agreement between it and a person who has sold merchandise or furnished services to, or at the request of, the assignor, shall be deemed to have been given as security for, or as a manner or method of repayment of, money actually advanced to, or at the request of, the assignor within the meaning of this section.

§ 5. The section heading and subdivision one of section fifty-two hundred fifty-two of the civil practice law and rules, as amended by chapter eleven hundred thirty-eight of the laws of nineteen hundred sixty-nine, are hereby amended to read, respectively, as follows:

Dismissal or lay off of employee to avoid compliance with income execution *or wage assignment*. 1. No employer shall discharge or lay off an employee because an income execution *or wage assignment* has been served upon such employer against the [employees] *employee's* wages.

§ 6. This act shall take effect September first, nineteen hundred seventy-four.

Opinion of the United States District Court

UNITED STATES DISTRICT COURT

N. D. NEW YORK

No. 70-CV-365

July 25, 1973

DORCAS BOND and BARBARA BALDWIN, on behalf of themselves and all others similarly situated,

Plaintiffs,

—v.—

WILLIAM H. DENTZER, Individually and as Superintendent of the Banking Department of the State of New York, *et al.*,

Defendants.

JAMES T. FOLEY, *Chief Judge.*

OPINION—JUDGMENT—ORDER

PART I—FACTS

The parties are in accord on the material facts in this case. Summary judgment is appropriate in such circumstances and the plaintiffs have filed a motion for the same. The defendants move to dismiss the complaint upon three stated grounds.

Plaintiffs Bond and Baldwin are of low-income and have been represented by the Legal Aid Society of Albany. They are each alleged to have owed amounts of under three hundred dollars to defendants, the Beneficial Finance Co. and

the Protective Loan Corp. (hereafter 'finance companies'). Contained in the debt contracts of each plaintiff were 'wage assignment agreements' as authorized by the New York State Personal Property Law, Article 3-A entitled "Assignment of Earnings" (§§ 46-49), McKinney's Consol. Laws, c. 41. The source of this controversy is the claim by the finance companies that there is a legal debt in existence, that a default has occurred thereon, and that they are entitled under the statute and the wage assignment agreement to execute against the wages of plaintiffs. The plaintiffs' position is simply that they possess valid legal defenses to these debts, but cannot assert them under these statutes in a way that guarantees their rights of due process. The single issue presented in the instant litigation is whether the procedure provided for in New York Assignment of Earnings statute is adequate for resolution of this controversy within the meaning of the Fourteenth Amendment's due process clause. While plaintiffs also base their claims on the equal protection clause, it is unnecessary to consider this issue since the holding of this court grants full relief on the due process issue. See Laprease v. Raymours Furniture Co., 315 F.Supp. 716, 724-725 (N.D.N.Y. 1970) (three-judge court). Other claims in this case, upon which there is less than full agreement, relate to the compliance with the various procedures of this statute. But these are essentially questions of state law and are unnecessary to the constitutional question addressed by this case.

Four preliminary issues of procedure were presented originally in this case. They were:

1. Whether this action could proceed as a class action;
2. Whether the N. Y. Superintendent of Banking was a proper party, necessitating the convening of a three-judge court for review of this statute;

3. Whether this court has jurisdiction of the controversy under Title 42 U.S.C. § 1983; and

4. even if there is jurisdiction, whether this court should postpone or delay its exercise under the abstention doctrine.

By my previous decision, the motion by plaintiffs to convene a three-judge court was denied and the motion to dismiss insofar as the action is sought to be maintained as a class action was granted. See Bond v. Dentzer, 325 F.Supp. 1343, 1352 (N.D.N.Y. 1971), petition for mandamus denied, Dk. No. 71-1467 (2d Cir. May 14, 1971). It is noteworthy at this juncture that subsequent to my previous decision the Supreme Court decided Lynch v. Household Finance, 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972), which expressly rejected the personal liberty-property doctrine of Eisen v. Eastman, 421 F.2d 560 (2d Cir. 1969) which I had discussed and followed in my *Bond* decision. See Lynch v. Household Finance, *supra,* 405 U.S. at 542, 92 S.Ct. 1113. The *Lynch* case along with the recent landmark case of Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1982, 32 L.Ed.2d 556 (1972), had been awaited to help in the resolution of the remaining issues of this case. The many subtle questions raised by these issues, some of which were alluded to and briefly discussed in my prior decision, have been answered by the Supreme Court in these and other recent cases, cited also in this decision.

Part II—Jurisdiction

Section 1983 of the Civil Rights Act provides a cause of action against:

> *Every person* who, under color of any statute, ordinance, regulation, custom, or usage, of any State or

> Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
>
> 42 U.S.C. § 1983 (emphasis supplied).

This statute clearly draws no distinction whether the primary actor is a "state officer or agent" or a "private individual". "Every person" reasonably means *any* person, publicly or privately characterized. (emphasis supplied). See Adickes v. Kress & Co., 398 U.S. 144, 152, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Essentially, it is the nature of the act, not the person, which is the determinative factor in resting jurisdiction upon Section 1983. Civil Rights Cases, 109 U.S. 3, 54-60, 3 S.Ct. 18, 27 L.Ed. 835 (1883) (Harland, J. dissenting); see also Hall v. Garson, 430 F.2d 430, 439 n. 20 (5th Cir. 1970).

Of course, in circumstances where the constitutional deprivation is by an agent or officer of the state, there is usually no question that acts pursuant to that title are under color of state law. But this only means that acts performed by private individuals supported by the state will be a subtler form of state action under § 1983, but no less offensive for this reason if the result is constitutional deprivation. United States v. Price, 383 U.S. 787, 794-795, 86 S.Ct. 1152, 16 L.Ed.2d 267 (1966).

There are two elements necessary to establish a cause of action under § 1983. The first element must establish that the plaintiff was deprived of a right secured by the Constitution; the second, that the defendant acted under

color of law. Adickes v. Kress & Co., *supra,* 398 U.S. at 150, 90 S.Ct. 1598. For purposes of the following "state action" discussion herein, it will be assumed *arguendo,* that the deprivation of a constitutional right can be shown. (See Part IV, *infra.*)

The variety of acts where a state can be involved in the deprivation of an individual's Constitutional rights is great. However, there have developed at least four generic patterns where state acts may be said to deprive a person of these rights:

A. Where the state acts through its own designated officers and agents.

B. Where the state becomes a "silent partner" in unconstitutional acts or where it adopts private interests and acts as its own.

C. Where the state authorizes, encourages, or creates an atmosphere where private interests deprive individuals of their constitutional rights. This may take the form of state inaction, whereby private individuals acting with the blessing of the state can accomplish what the state could not do directly.

D. Where functions normally or traditionally performed by the state are delegated to or performed by private interests.

A. State Officer or Agent

By my previous decision [325 F.Supp. 1343, 1348-1349 (N.D.N.Y. 1971), petition for mandamus denied, Dk. No. 71-1467 (2d Cir. May 14, 1971)], the State Banking Superintendent was dismissed from this action as an improper party. Fed. R. Civ. Proc. 21; see also Committee for Pub-

lic Education and Religious Liberty v. Rockefeller, 322 F.Supp. 678, 685-686 (S.D.N.Y. 1971); Hernandez v. European Auto Collision, 346 F.Supp. 313, 316 (E.D.N.Y. 1972), rev'd on other grounds, 487 F.2d 378, Dk. No. 406 (2d Cir. 1973); McCormick v. First National Bank of Miami, 322 F.Supp. 604, 608 (S.D. Fla. 1971); Klim v. Jones, 315 F. Supp. 109, 112-113 (N.D. Cal. 1970); Moody v. Flowers, 387 U.S. 97, 102, 87 S.Ct. 1544, 18 L.Ed.2d 643 (1967); Wilentz v. Sovereign Camp, 306 U.S. 573, 579-580, 59 S.Ct. 709, 83 L.Ed. 994 (1939); compare, Barber v. Rader, 350 F.Supp. 183, 186 (S.D. Fla. 1972) (three-judge court) (per curiam). Thus no state official remains as a party-defendant and hence there is no "pure" state action in the sense previously discussed, and this case is inappropriate for the convening of a three-judge court.

Notwithstanding the absence of acts performed directly by the state through a designated agent, I do find that there is state action of the kind under principles "B-D" hereinafter discussed.

B. Partnership

Burton v. Wilmington Parking Authority, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961) provides the best example of the state becoming a silent business partner with private interests. In this case the "Eagle" restaurant, a privately owned concern, leased building and parking facilities from a state agency. The Court held that discrimination practiced by the Eagle was state action because:

> [t]he State has so far insinuated itself into a position of interdependence with Eagle that it must be recognized as a joint participant in the challenged activity ... *Id.*, at 725, 81 S.Ct. at 862.

There was a mutuality of economic interests and a coordinated effort to discriminate, i.e., the use by the restaurant of a public building and public parking-lot facilitated their "private" acts of discrimination. In Adickes v. Kress & Co., *supra,* 398 U.S. at 152, 90 S.Ct. 1598, the same principle is expressed in circumstances similar to *Burton.* There, a private interest linked with a state custom or policy was viewed as joint action that deprived persons of their constitutional rights, even though the private interest was the dominant actor. Similarly, under certain kinds of state liquor license regulation private interests are given such economic advantages that they become business partners with the state in the regulation. Bennett v. Dyer's Chop House, Inc., 350 F.Supp. 153, 154-155 (N.D. Ohio 1972); Seidenberg v. McSorleys' Old Ale House, Inc., 317 F.Supp. 593, 603 (S.D.N.Y. 1970). The acts of the private interest in depriving persons of constitutional rights in these circumstances are the acts of the partnership and are attributable to the public or state interest, ergo, they are state action under § 1983. The recent holding in Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972), to my mind is not inconsistent with this view. The Court there held that the facts did not show an economic mutuality that advanced the discriminatory acts of the private interest; hence no state action based on a "partnership" was formed. *Id.,* at 177, 92 S.Ct. 1965.

The judicial branch of state government may also be the silent partner, using its power to further the acts of private interests which deprive a person of constitutional rights. Shelley v. Kraemer, 334 U.S. 1, 19, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, 682, 50 S.Ct. 451, 74 L.Ed. 1107 (1930). Such procedures are most common to the creditor-debtor sphere of law where

creditors, by virtue of their economic power have been allowed to circumvent some legal procedures. Most of these procedural short-cuts can only increase the power of the creditor vis à vis his debtor. The Court of Appeals, Second Circuit, recently made an observation that the:

> [a]ppellee, a finance company, is not a stranger to the coercive advantages provided by the confessed judgment device; undoubtedly, it is full aware that the procedure allowes a creditor to avoid formal, lengthy, and expensive legal proceedings in order to collect from his debtor, and that it is precisely for this reason that lenders use the confessed judgment.

Alland v. Consumer's Credit Corp., 476 F.2d 941, 957, Dk. No. 410 (2d Cir., 1973).

Many other short-cut judicial procedures have been condemned by both Federal and state courts through the nation. See Swarb v. Lennox, 314 F.Supp. 1091, 1095 (E.D. Pa. 1970) (three-judge court), affirmed, 405 U.S. 191, 92 S.Ct. 767, 31 L.Ed.2d 138 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969); generally, Brown, A Meaningful Opportunity to be Heard, 46 St. John's L.Rev. 25, 25-26 (1971).

Article 3A of New York State's Personal Property Law creates a significant economic advantage for creditor finance companies through its wage assignment procedure. The loan companies are authorized by the pertinent sections to actually attach the wages of a person without any obligation to ever seek any sort of judicial determination, that a legal debt exists in fact and a default has occurred thereon, which justifies their action. Fuentes v. Shevin, 407 U.S. 67, 87 n. 17, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972); Laprease v. Raymours Furniture Co., 315 F.Supp. 716,

723 n. 9 (N.D.N.Y. 1970) (three-judge court); Hernandez v. European Auto Collision, Inc., 487 F.2d 378, Dk. No. 406 (2d Cir. 1973); Logan v. Short, 342 F.Supp. 1349, 1352 n. 2 (E.D. Mo. 1972). Under extremely particularized and narrow circumstances a compelling state interest may justify the abbreviation or elimination of important judicial procedures, but under the admitted facts here this certainly is not such a case. See Fuentes v. Shevin, *supra*, 407 U.S. at 90-93, 92 S.Ct. 1983.

The wage assignment statute challenged merges, in my judgment, state power and private economic interests to permit the taking of a percentage of the wages of gainful employment without any opportunity for a judge to hear each side of the controversy *before* taking of portions of wages in any respect. The state delegates the power allowing finance companies to proceed without any judicial interposition and in this sense, in my judgment, there is the same mutuality of economic interest or similarity of purpose that was found and condemned in *Burton* and *Adickes*, and thus qualifies as state action under § 1983. *Cf.* Lynch v.Household Finance Corp., 405 U.S. 538, 553-556, 92 S.Ct. 1113, 31 L.Ed.2d 424 (1972).

C. Encouragement

The fact that the state statutory wage assignments aid finance companies economically is certainly encouragement in itself. But even beyond this factor, the statutory scheme commands the procedures that result in the deprivation of substantial rights of persons by private interests. See N.Y. Pers.Prop.L. § 46-b.

To create this type of atmosphere, the state need not take an affirmative role in the acts depriving another of constitutional rights; it is enough that the consequences of

state "neutrality" allow private interests to do so. Reitman v. Mulkey, 387 U.S. 369, 381, 87 S.Ct. 1627, 18 L.Ed. 2d 830 (1967); see also, *Id.*, at 381 et seq., 87 S.Ct. 1627 (Douglas, J., concurring). The lesson of *Reitman* is that state policy is not necessarily what the state law says it is, rather what the policy *de facto* is found to be. Accordingly, the Supreme Court chose the findings of fact by the California Supreme Court instead of the state constitutional declaration of state neutrality and non-involvement in private discrimination, when it affirmed the California Supreme Court's finding that the state policy in fact was not "neutral" but rather encouraged unconstitutional discrimination. *Id.*, at 381, 87 S.Ct. 1627.

The wage assignment statute of New York presents a much less hidden "state encouragement" because it "is not just action against a backdrop of an amorphous state policy, but instead action encouraged, indeed only made possible, by explicit state authorization". Klim v. Jones, *supra,* 315 F.Supp. at 114 (N.D. Cal. 1970); see also Barber v. Rader, *supra,* 350 F.Supp. at 189 (S.D. Fla. 1972) (per curiam) (three-judge court). The atmosphere created by the New York wage assignment scheme encourages the finance companies to take unilateral, non-judicial action and compels the debtor, usually of low income, to capitulate to these pressures "waiving" certain rights to get the needed loan (see Part IV C, *infra*) and signing away the right to judicial intervention against the finance company's action, no matter the presence of valid defense or dispute.

New York's statute makes these wage assignment agreements so advantageous to the finance companies that they are contracts of adhesion as far as these plaintiffs are concerned in the light of the several recent Supreme Court analyses in similar situations. Indeed, this is virtu-

ally conceded by defendants. (Defendants' Supplemental Memorandum, p. 6). Under these circumstances, it becomes easy for finance companies to obtain such agreements from debtor-clients. Fuentes v. Shevin, *supra,* 407 U.S. at 83 n. 13, 92 S.Ct. 1983, 32 L.Ed.2d 556; Alland v. Consumers Credit Corp., *supra,* 476 F.2d at 956. In general, finance companies can use these advantageous legal procedures to increase the already disproportionate balance of bargaining power and to coerce the debtor into "refinancing" his loan, or into not asserting what might be a meritorious defense against the debt, or other such acts not in the debtor's interest. Sniadach v. Family Finance Corp., *supra,* 395 U.S. at 341, 89 S.Ct. 1820, 23 L.Ed.2d 349 (1969); see, Note, Protecting the Low-Income Consumer: Procedural Due Process Revisited, 14 William & Mary L.Rev. 337 (1972). The attractiveness and singularity of the statutory wage assignment procedure induces uniformity among the finance companies to use virtually identical wage assignment agreements. Pers. Prop.L. § 46-b. This severely reduces a debtor's options in the small loan market especially if he is in need of a loan and must use his wages as collateral, because it is doubtful he could find a finance company that would negotiate for different procedures other than the assignment. Adams v. Egley, 338 F.Supp. 614, 620-621 (S.D. Cal. 1972); Santiago v. McElroy, 319 F.Supp. 284, 294 (E.D. Pa. 1970) (three-judge court). As the finance companies are encouraged to use this procedure, there are also forces which discourage the assignor-debtor from challenging any actions of the finance company in court. For example, while section 47-e provides for a special proceeding to vacate a wage assignment prior to its execution, a close review of the statute and cases interpreting it convince me that this procedure may not be employed in a defense going

to substance, e.g., challenging the validity of the debt itself. See Cajuste v. Budget Credit, 5 Misc.2d 948, 162 N.Y.S.2d 748 (1957); Fuentes v. Shevin, *supra,* 407 U.S. at 97, 92 S.Ct. 1983, 32 L.Ed.2d 556, and Holt v. Brown, 336 F.Supp. 2, 6 (W.D. Ky. 1971). So even assuming that a low-income assignor was aware of this proceeding and could obtain counsel in time to stop the taking of his wages, there is great doubt that he could obtain a meaningful review which would include all of his defenses.

Yet another serious shortcoming of these statutes is that they effect a reversal in the burden of proof. Instead of the finance company having to initiate action and prove that there is a debt and that there has been a default thereon, the debtor must initiate the action to prove the invalidity of the debt. Given the relative economic power and legal resources of these parties, this anomaly has a particularly harsh effect upon the debtor. See *infra,* Part IV, A and B.

The foregoing observations convince me that the state has nurtured and encouraged the policy and acts of finance companies to demand wage assignments from such persons as plaintiffs herein. The state delegates the power to the finance company to unilaterally decide when a debt exists and default occurs. It denies the debtor, in my judgment, an effective and realistic way to challenge that determination before the company can take the wages. Laprease v. Raymours Furniture Co., *supra,* 315 F.Supp. at 723; Hernandez v. European Auto Collision, Inc., *supra,* 487 F.2d at 483, n. 1.

D. Traditional State Functions

Under this theory courts have held that where a private individual is performing a function pursuant to a right

accorded by statute, where that function is traditionally performed by the state, those acts of the individual may be described as state action. Hernandez v. European Auto Auto Collision, *supra,* 346 F.Supp. at 317 n. 4; Hall v. Garson, *supra,* 430 F.2d at 438-439; Palmer v. Columbia Gas Co. of Ohio, 342 F.Supp. 241, 246 (N.D. Ohio 1972).

Under our law the debtors are entitled to have the creditor prove the debt and the default of its terms. See *infra,* Part IV, B. Proof may be an *ex parte* or a full adversary hearing, but both must involve review by a judicial officer as an element. Laprease v. Raymours Furniture Co., *supra.* Since the need for a court to render a judgment and for a sheriff or other official to execute it is obviated and instead left to the company to accomplish, the law can be said to delegate a traditional state function to a private interest.

Part III—Abstention

Defendants urge this court to postpone the exercise of its jurisdiction pending litigation in the state courts, arguing that this case falls within the abstention doctrine. The principal thrust of their argument is that the questions presented by this case have never been addressed by the New York Court of Appeals, the state's highest court. But the abstention doctrine has never been based on such a proposition. Zwickler v. Koota, 389 U.S. 241, 251, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967); Harman v. Forssenius, 380 U.S. 528, 534-537, 85 S.Ct. 1177, 14 L.Ed.2d 50 (1965); Meredith v. Winter Haven, 320 U.S. 228, 234-235, 64 S.Ct. 7, 88 L.Ed. 9 (1943). The doctrine is simply not that broad.

> The doctrine of abstention, under which a District Court may decline to exercise or postpone the exer-

> cise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest.

Allegheny County v. Mashuda Co., 360 U.S. 185, 188-189, 79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163 (1959). Where jurisdiction is proper in both state and federal courts, it is the duty of both to address the complaint where the plaintiff chooses to have it heard. McNeese v. Board of Education, 373 U.S. 668, 672, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963). Furthermore, there is a special duty upon federal courts to exercise their jurisdiction in civil rights cases because abstention is least appropriate where federal civil rights are in jeopardy. Holmes v. New York City Housing Authority, 398 F.2d 262, 265-266 (2d Cir. 1968); Wright v. McMann, 387 F.2d 519, 525 (2d Cir. 1967); Owens v. Parham, 350 F.Supp. 598, 600 (N.D. Ga. 1972) (three-judge court); Musselman v. Spies, 343 F.Supp. 528, 533 (M.D. Pa. 1972) (three-judge court); Holt v. Brown, 336 F. Supp. 2, 5 (W.D. Ky. 1971) (three-judge court); Santiago v. McElroy, 319 F.Supp. 284, 292 (E.D. Pa. 1970) three-judge court). Abstention is not a doctrine that defers to state courts, preserving comity by causing additional hardship for the parties, especially the plaintiff. Rather, it is a rule of discretion to be exercised when the district court believes that some asset particular to the state's courts jurisdiction will most likely aid in adjudicating the merits of the litigation, Railroad Comm'n. v. Pullman Co., 312 U.S. 496, 500-501, 61 S.Ct. 643, 85 L.Ed. 971 (1941); or

where the nature of the state court's particular assistance to the litigation might be in providing a necessary background to understanding the significance of the issues to the state itself. Reetz v. Bozanich, 397 U.S. 82, 90 S.Ct. 788, 25 L.Ed.2d 68 (1970); Kaiser Steel Corp. v. W. S. Ranch, 391 U.S. 593, 88 S.Ct. 1753, 20 L.Ed.2d 835 (1968) (per curiam). In either situation, the enhanced likelihood of a more informed adjudication, still preserving a day in federal court, justifies the accompanying delay of abstention. Both *Reetz* and *Kaiser Steel* were controversies involving natural resources important to the very survival of two states, fish in Alaskan waters and water in arid New Mexico. It was thought wiser to allow the state courts to attempt to resolve the issues under state law, consistent with the federal constitution, before a federal court pre-empted this opportunity with perhaps a less informed or less sensitive solution. Wisconsin v. Constantineau, 400 U.S. 433, 438, 91 S.Ct. 507, 27 L.Ed.2d 515 (1971); see also, Holmes v. New York City Housing Authority, *supra,* 398 F.2d at 266-267.

Since state courts will presumably be bound by and thus apply the federal constitution, abstention is sometimes a matter of allowing the state courts to construe their own statutes in a manner that will be consistent with the federal constitution. In cases of a genuinely ambiguous statute this will preserve both the constitutional rights of plaintiff and the operation of the state statute. But where the state statute is unambiguous and does not need an authoritative state court decision to be understood, there is then no reason to postpone or deny plaintiff his right to relief in a federal court established by Congress for this very purpose.

New York's wage assignment statute does not provide, as I read and analyze it, for a meaningful hearing before

the execution against wages. There is no ambiguity present in my judgment and, therefore, under compelling case law of the highest federal judicial authority, no justification to abstain. Wisconsin v. Constantineau, *supra,* 400 U.S. at 439, 91 S.Ct. 507; Snead v. Dept. of Social Services, City of New York, 355 F.Supp. 764 (S.D.N.Y. 1973) (three-judge court), appeal filed, 41 U.S.L.W. 3659 (June 11, 1973).

Abstention may sometimes be justified if a federal court order might seriously disrupt the operation of state government, Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 329, 84 S.Ct. 1293, 12 L.Ed.2d 350 (1964). However, since there is no state officer as a party defendant in this action, there is no such consideration. See *supra,* Part II, A; Allegheny County v. Mashuda Co., *supra,* 360 U.S. at 189-190, 79 S.Ct. 1060. Indeed, there can be no effect upon state operations at all since the wage assignment statute is largely a self-help measure aiding in the collection efforts of the finance companies. Meredith v. Winter Haven, *supra,* 320 U.S. at 237, 64 S.Ct. 7, 88 L.Ed. 9; Rakes v. Coleman, 359 F.Supp. 370 (E.D. Va. 1973).

Lastly, two aspects of the case at bar make it especially inappropriate for the withholding of jurisdiction. First, there is substantial doubt that New York provides an adequate remedy to plaintiffs which would be sufficient to prevent the wage attachment. See *infra,* Part IV, C(1); McNeese v. Board of Education, *supra,* 373 U.S. at 674-676, 83 S.Ct. 1433, 10 L.Ed.2d 622; Hillsborough v. Cromwell, 326 U.S. 620, 628, 66 S.Ct. 445, 90 L.Ed. 358 (1946). The mere similarity of due process rights in both federal and state constitutions does not affect this "doubtfulness" sufficiently to justify abstention. Monroe v. Pape, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); Committee for

Public Education and Religious Liberty v. Levitt, 342 F. Supp. 439, 442 (S.D.N.Y. 1972) (three-judge court).

Second, abstention is within the equitable discretion of the district court. The decision on abstention may properly consider hardships to plaintiffs resulting from the delay and expense of beginning again in state court, or other such factors. Allegheny County v. Mashuda Co., *supra,* 360 U.S. at 196-197, 79 S.Ct. 1060; Meredith v. Winter Haven, *supra,* 320 U.S. at 237, 64 S.Ct. 7; Holmes v. New York City Housing Authority, *supra,* 398 F.2d at 268. Accordingly, I believe plaintiffs in this case, being of low-income and represented by Legal Aid, would be put to excessive hardship should this court refuse to take jurisdiction. Therefore, I have come to the conclusion, upon further reflection and in view of the clarity in recent Supreme Court decisions, that abstention, in effect to stand by and await state court rulings, should not be invoked.

Part IV—Merits

A. Due Process

It is well settled law that where the state is involved in any deprivation of a property interest, whether temporary or permanent, contingent or final, there is a:

> duty of government to follow a fair process of decisionmaking . . . to protect against arbitrary deprivation of property. For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented. It has long been recognized that "fairness can rarely be obtained by secret, one-sided determination of facts decisive or rights. . . ."

Fuentes v. Shevin, 407 U.S. 67, 80-81, 92 S.Ct. 1983, 1994 (1972).

It must be emphasized that the *Fuentes* case addressed itself primarily to the property interest in the "continued use of the goods", and indicated that this right is separate from the determinations of the right to ultimate possession or ownership. Hernandez v. Eureopean Auto Collision, Inc., 487 F.2d 378, 385, Dk. No. 406 (2d Cir. 1973) (Timbers, J., joined by Lumbard, J., concurring); Mason v. Garris, 360 F.Supp. 420 (N.D. Ga., 1973); Straley v. Gassaway Motor Co., Inc., 359 F.Supp. 902 (S.W.D. Va., 1973). Therefore, whether defendants in the instant action will ultimately be entitled to execute, their wage assignment against the plaintiffs or not, there is no question that the plaintiffs have a right to the continued use of their wages in the same way as declared in *Fuentes*. The legal import of an "assignment" of wages might be the transfer of title or equitable ownership in the wages to defendants, in effect similar to the terms of the sales contract in *Fuentes*. But even so plaintiffs here are still entitled to the retention and continued use of their wages as Mrs. Fuentes was entitled to continued possession and use of her property. It is this right which the Supreme Court protected by mandating that it be accorded a meaningful notice and hearing prior to any taking involving the state or its laws. Without such procedures the chances for exploitation, harassment and plain mistake are enormously greater. See e.g., Bronson v. Consoliated Edison Co. of New York, Inc., 350 F.Supp. 443 (S.D.N.Y. 1972).

The safeguards inherent in a judicial hearing take an added importance when the victims of potential abuse are persons of low income who are generally unknowledgeable of even ordinary legal procedures. Alland v. Consumers

Credit Corp., 476 F.2d 951, 956 (2d Cir., 1973). The mystery of such subtle legal procedures as wage assignments can often envelop persons of low income in a "credit nightmare"—unable to vindicate their rights. For a low income person, wages might be the only valuable asset that could be used to secure a small loan. Thus the taking of a person's wages in light of these pressures "may as a practical matter drive a wage-earning family to the wall." Sniadach v. Family Finance Corp., 395 U.S. 337, 341-342, 89 S.Ct. 1820, 1822-1823, 23 L.Ed.2d 349 (1969). This leverage unfortunately has been used by some finance companies to "refinance", i.e., increase, the obligations of their debtors or to otherwise increase their leverage. Note, Protecting the Low Income Consumer; Procedural Due Process Revisited, 14 William & Mary L.Rev. 337, 341 (1972).

Pressures upon the wage assignment debtor not only emanate from the creditor-finance company, but also from the debtor's employer who becomes saddled with the administration of the wage assignment. Indeed, the service of the wage assignment upon the employer, even without any prior judicial review or ratification, makes the employer subject to legal liability for any failure to administer the assignment. New York Personal Property Law § 48-a and 46-b; Continental Purchasing Co. v. Van Raalte Co., 251 App. Div. 151, 295 N.Y.S. 867 (4th Dept. 1937). And even if the debtor is dismissed or resigns from the employ of this job and takes another from a different employer, the assignment can easily follow him after a very simple refiling procedure. N.Y. Pers. Prop. L. § 48-c. In cases where the debtor holds an expendable or marginal job, these pressures mitigate against retaining or hiring him as an employee because of his personal debt problems. Note, Wage Garnishment in New York State: Practical Problems of the Employer, 34 Albany L.Rev. 395, 411-418 (1970). New

York State has recognized this problem, at least in terms of "income executions" (N.Y. CPLR § 5231) and has prohibited the dismissal of employees for such reasons. Siegel, Practice Commentary; N.Y. CPLR § 5252 (Supp.). But there is no statutory amelioration of the similar pressures resulting from a wage assignment. New York's wage assignment statute thus leaves the assignor, already reluctant to defend himself because of the inherent economic realities, at the mercy of the unilateral decision of his finance company to take a portion of his wages. Laprease v. Raymours Furniture Co., 315 F.Supp. 716, 722 (N.D.N.Y. 1970) (three-judge court).

The specific procedures that are necessary to satisfy due process may vary widely with the needs of the parties and the surrounding circumstances. Burton v. Wilmington Parking Authority, 365 U.S. 715, 725-726, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). However, the fundamental concepts are the same no matter what specific procedures are mandated. It is the notion that society:

> must recognize a moral obligation to see that disputes are resolved on the basis of their merits rather than on the basis of the relative power of the contestants.
>
> B. Christensen, Lawyers for People of Moderate Means 79 (1970), *cited in* Brown, A Meaningful Opportunity to be Heard, 46 St. John's L.Rev. 25, 25 (1971).

At the least this means that a neutral magistrate should listen to both sides of the dispute before either party is authorized by state law to take the other's property. And the absence of this fundamental procedure to my mind is precisely the failing of the wage assignment statute. It tacitly allows finance companies to unilaterally determine that a default by the debtor has occurred. Moreover, this decision is safe from review by any judicial or other neutral

party except insofar as the debtor might be knowledgeable and resourceful enough to seek meaningful review in a court. This is the problem addressed by the Supreme Court in *Fuentes*:

> The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark.
>
> Fuentes v. Shevin, *supra,* 407 U.S. at 93, 92 S.Ct. at 2001.

This was also of central concern in Lynch v. Household Finance Corp., 405 U.S. 538, 92 S.Ct. 1113, 31 L.Ed.2d 424 (972):

> The garnished property is secured, not under the authority of the court, but merely in the hands of the garnishee * * * Prejudgment garnishment is thus levied and maintained without the participation of the state courts . . . . Garnishment *might* serve to make a *subsequent* judgment effective * * * But the garnishment was, in this case, an action taken by private parties who were not proceeding under a court's supervision and who were using, as agents, state officials who were themselves not acting pursuant to a court order or under a court's authority. (emphasis in original.)
>
> *Id.,* at 554, 92 S.Ct. at 1123.

There can be no doubt that the power to determine and declare a default is crucial, for it underlies and presumes the legality of the wage assignment itself. N.Y. Pers. Prop. L. § 48. Perhaps more important is the fact that if a court proceeding was mandated, the finance company would have to show at least that a debt existed and a default had in fact occurred; and the fact that a person has fallen behind or has failed to make payments does not obviate the need for a hearing. Fuentes v. Shevin, *supra*, 407 U.S. at 87 n. 17, 92 S.Ct. 1983, 32 L.Ed.2d 556; Snead v. Dept. of Social Services of City of New York, 355 F.Supp. 764 (S.D.N.Y. 1973) (three-judge court), appeal filed, 41 U.S.L.W. 3659 (June 11, 1973); see Part II, B, *supra*.

The issue of default is one that requires an adversary hearing. The New York wage assignment statute challenged is unconstitutional for its failure to provide for a hearing on this issue prior to authorizing execution against a person's wages by the finance company, as required by the due process clause of the Fourteenth Amendment.

B

The defendants raise three arguments against this conclusion, but none of them affect this holding or the precedents underlying it. Defendants argue that:

1. The New York Personal Property Law does provide for a hearing by special proceeding under Pers. Prop. L. § 47-e.

2. Wage assignments were recognized at common law and the New York statutes at issue here are simply a codification of the common law.

3. The assignor-debtor was a free agent who contractually agreed to this procedure, and therefore waives any constitutional rights to object thereafter.

1. Hearings

In cases of the deprivation of any property interest involving the state, either a hearing must be provided for both parties of a type that can realistically and actually prevent the initial deprivation; or if the rationale for some type of *ex parte* procedure exists then "at least that the creditor present to a judicial officer the circumstances allegedly justifying summary action." Laprease v. Raymours Furniture Co., *supra,* 315 F.Supp. at 724. The New York wage assignment statute satisfies neither of these requirements. Under some circumstances, it has been ruled that there is justification for *ex parte* procedure, see Fuentes v. Shevin, *supra,* 407 U.S. at 90-93, 92 S.Ct. 1983, 32 L.Ed.2d 556; Geisinger v. Voss, 352 F.Supp. 104, 109-111 (E.D. Wis. 1972), but the instant wage assignment law provides for no such procedure generally. In terms of an adversary hearing, the only kind that are contemplated by these statutes are a special proceeding to vacate the assignment [§ 47-e] and a full plenary civil suit, both of which occur only upon the initiation of the debtor. Neither of these procedures in these circumstances, in my judgment, satisfy due process; the former is too little and the latter too late to prevent the initial deprivation.

It is sufficiently doubtful that all essential elements of the controversy, including the legal validity of the debt, can be heard at a special proceeding under § 47-e. Cajuste v. Budget Credit, Inc., *supra.* This uncertainty makes the procedure constitutionally unsatisfactory. Bell v. Burson, 402 U.S. 535, 542-543, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971); see also Brinkerhoff-Faris Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930); Bronson v. Consolidated Edison Co. of New York, Inc., *supra,* 350 F.Supp. at 449. And the fact that these issues could be litigated in a full civil suit,

which is not quick enough to prevent the deprivation, is immaterial to the due process claim made here. Fuentes v. Shevin, *supra*. However, even beyond the inadequacies of these hearings, making it incumbent upon the debtor to challenge the seizure of his already marginal wages merely serves to further diminish his ability to defend himself against the greater power of the finance company. It places the burden of going forward with a challenge to the wage assignment upon the assignor. This gives at least a presumption of validity to the actions of the finance company against both the debtor and his employer. It is unrealistic to believe that most people of low income who have legitimate defenses will be able to assert them under such pressures. Fuentes v. Shevin, *supra*, 407 U.S. at 83, n. 13, 92 S.Ct. 1983, 32 L.Ed.2d 556. A statute should not leave a person in the awkward position of defending his property in court before another has even approached a court to legally claim it, especially when he has very little property and questionable legal resources to defend it adequately against the likes of corporate claimants who are in the business and quite familiar with such matters. Hernandez v. European Auto Collision, Inc., *supra*, 487 F.2d at 378, Dk. No. 406.

2. Common Law

While it is true that assignment procedures were known to common law, its history bears little resemblance to the present statutes. And with specific reference to "voluntary assignments for the benefit of creditors", it can be said that they were in many respects peculiar to American common law and that they received their greatest development here during the industrialization of our economy with its credit expansion in the latter part of the nineteenth century. A. Burrill, A Treatise of Voluntary Assignments for

the Benefit of Creditors 5 (3rd ed. 1882); R. Headley, The Law of Voluntary Assignments for the Benefit of Creditors under the New York Statutes, (Preface) (1896). Assignments have been frowned upon in English common law because of their great potential to conceal fraud. Thus in the American development, particularly early codifications, there was clearly a great concern to temporize the common law procedures with liberal judicial supervision. This supervision usually included hearings where all parties having any interest were notified and heard by a court before significant action could be taken by any party on an assignment. J. Bishop, Insolvent Debtors and the Law of Voluntary Assignment (Treatise) 111 et seq.; R. Headley, *supra,* at 7 and 17. But there is really no need to detail all of the changes occurring to the common law. Common law or codification of it may be overly harsh when viewed in the light of the Constitution. Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948); Santiago v. McElroy, *supra,* 319 F.Supp. at 295; Klim v. Jones, *supra,* 315 F. Supp. at 120-121; Shaffer v. Holbrook, 346 F.Supp. 762 (S.D. W.Va. 1972). However, the comparison is useful to make clear the reason why the New York wage assignment statute fails to satisfy due process. The debt contract is one of the oldest forms of action in recorded common law and underlies the principle of "consideration" in contracts. The most fundamental element of every debt contract action in common law was an affirmative showing of the existence of the debt by the creditor before a magistrate. A satisfactory showing of the debt involved proof beyond general allegation of the debt. To wit:

> [i]t was characteristic of the German procedure that the defendant [debtor] could meet that complaint by answering, in equally general form, that he did not owe the plaintiff. The plaintiff had to do more than

> simply allege a debt, if he would prevent the defendant from escaping in that way. In England, if the plaintiff had not something to show for his debt, the defendant's denial turned him out of court; and even if he had, he was liable to be defeated by the defendant's swearing with some of his friends to back him up that he owed nothing.
>
> O. W. Holmes, The Common Law, 199. (Howe ed., 1963.)

Under some circumstances common law did countenance some prejudgment deprivations of property, but as the Supreme Court has recently observed:

> on the occasions when the common law did allow prejudgment seizure by state power, it provided some kind of notice and opportunity to be heard to the party then in possession of the property, and a state official made at least a summary determination of the relative rights of the disputing parties before stepping into the dispute and taking goods from one of them.
>
> Fuentes v. Shevin, *supra*, 407 U.S. at 79-80, 92 S.Ct. at 1993-1994.

The New York statutes however countenance a legal procedure that can be set in motion by one party depriving another of his property without a court or state official ever being aware of it. Neither the Constitution, common-law or common sense ratify this type of procedure. Peak v. United States, 353 U.S. 43, 46, 77 S.Ct. 613, 1 L.Ed.2d 631 (1957). American tradition and fundamental due process have always assumed that there are at least two sides to every story. Anti-Fascist Committee v. McGrath, 341 U.S. 123, 160-165, 71 S.Ct. 624, 95 L.Ed. 817 (1951) (Frankfurter, J.

concurring). New York's wage assignment law makes it quite possible that one side will not be heard because of their unnecessary forfeiture of constitutional rights.

3. Waiver

The final question of whether plaintiffs waive any constitutional rights needs very little discussion in light of *Fuentes*. The defendants all but admit that the wage assignment agreements are adhesion contracts (Defendants' Supplemental Memorandum at p. 6). The subject of waiver under similar circumstances has been extensively discussed in *Fuentes, supra*, 407 U.S. at 94-96, 92 S.Ct. 1983, 32 L.Ed.2d 556, and when contrasted to a factual situation where a proper contractual waiver was made [see D. H. Overmyer Co. v. Frick Co., 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972)], it leaves little doubt that plaintiffs in the instant case did not have the capacity to waive any rights under the wage assignment agreements. However, having perused the wage assignment agreements of both defendants, this court has been unable to discover any language, explicit or implicit, purporting to be a waiver of the right of debtors to have creditors prove at least that there is a debt and a default thereon. This is certainly a more serious flaw:

> [f]or a waiver of constitutional rights in any context must, at the very *least*, be clear. We need not concern ourselves with the involuntariness or unintelligence of of a waiver when the contractual language relied upon does not, on its face, even amount to a waiver . . . . The contracts included nothing about the waiver of a prior hearing. They did not indicate *how* or *through what process*—a final judgment, self-help, prejudgment replevin with a prior hearing, or prejudgment replevin

> without a prior hearing—the seller could take back the goods. Rather, the purported waiver provisions here are no more than a statement of the seller's right to repossession upon the occurrence of certain events. The appellees do not suggest that these provisions waived the appellants' right to a full post-seizure hearing to determine whether those events had in fact occurred and to consider any other available defenses. By the same token, the language of the purported waiver provisions did not waive the appellants' constitutional right to a preseizure hearing of some kind. (emphasis in original.)

Fuentes v. Shevin, *supra,* 407 U.S. at 95-96, 92 S.Ct. at 2002; *see also,* Swarb v. Lennox, 405 U.S. 191, 201, 92 S.Ct. 767, 31 L.Ed.2d 138 (1972); compare, D. H. Overmeyer Co. v. Frick Co., *supra,* 405 U.S. at 188, 92 S.Ct. 775, 31 L.Ed.2d 124. This is precisely the case here. Defendants' wage assignment agreements do not even purport to waive a hearing on default or to waive any defenses to the fundamental validity of the debt, much less to qualify as a waiver under the Constitution. I find no grounds in law or fact to seriously argue that there has been a waiver. The assignor only agrees to give his wages as collateral *if there is a default.* This does not include allowing the company to unilaterally and presumptively declare default. Santiago v. McElroy, *supra,* 319 F.Supp. at 294; Hernandez v. European Auto Collission, *supra,* 487 F.2d at 383, Dk. No. 406. In a very recent ruling, Judge Gignoux applied the *Fuentes* reasoning to declare Maine Laws that permit prejudgment attachment of real estate without prior notice and hearing violative of the Due Process Clause of the Fourteenth Amendment and unenforceable. Lake Arrowhead Estates Inc. v. Cumming, 360 F.Supp. 1085 (D.C.D. Maine, S.D. 1973).

Part V—Conclusion and Order

The history of our liberty has been in large measure, a history of procedure. It is an ancient principle evolved from the common law and consistently re-affirmed by the Supreme Court, that access to a court of law promotes the rule of law instead of a rule by force. The potential abuse in situations where one person claims the property of another, especially when the economic advantages favor one side, is greatly reduced when both sides can be brought before a court to present the merits of their position. It is always preferable to determine the merits prior to a taking and to thereafter allow the taking of property to proceed under the supervision and by written order of a court, rather than to statutorily authorize a party in interest to take the property unfettered by even an *ex parte* review by a court.

With this in mind, the following order is not meant to affect the legal device of the wage assignment *per se*. As previously mentioned, this type of collateral might well be the only security a person of low income might have to obtain a loan. Its assistance in encouraging finance companies to grant loans is not intended to be hampered by this decision, except as restricted herein, nor is this ruling meant to unduly burden the finance companies with a costly or delaying procedure. Indeed, if there is no merit to a debtor's position, it should not take very long to demonstrate this fact to a court. Lastly, and equally important, this decision is not meant to dictate what I think New York State should do in providing for a meaningful hearing with adequate notice to all interested parties. As the Supreme Court said in *Fuentes*:

> [t]he nature and form of such prior hearings, moreover, are legitimately open to many potential varia-

tions and are subject, at this point, for legislation—not adjudication.

Fuentes v. Shevin, 407 U.S. 67, 96-97, 92 S.Ct. 1983, 2002, 32 L.Ed.2d 556 (1972); see also, Bell v. Burson, 402 U.S. 535, 542-543, 91 S.Ct. 1586, 29 L.Ed.2d 90 (1971).

For these reasons, the cross-motion of the plaintiffs for summary judgment is granted and shall enter in their favor to the following extent:

1. The provisions of the New York Personal Property Law—Article 3A entitled "Assignment of Earnings", Sections 46 to 49, which permit the attachment of wages without an order of a judge or court of competent jurisdiction are hereby declared unconstitutional on their face and as applied insofar as they provide for execution against wages by service of wage assignments on employers without actual notice and an opportunity to be heard being accorded the assignor and are declared in those respects as violative of the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

2. The defendants are enjoined and restrained from implementing or enforcing said provisions and procedures of Article 3A to enforce their wage assignment agreements against these plaintiffs unless an order of a court or judge is first obtained. See Laprease v. Raymours Furniture Co., *supra,* 315 F.Supp. at 725.

The motion of the defendants to dismiss the complaint upon stated grounds is denied and dismissed.

It is so ordered.

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 609—September Term, 1973.

(Argued December 10, 1973 Decided March 13, 1974.)

Docket No. 73-2377

DORCAS BOND and BARBARA BALDWIN,

Plaintiffs-Appellees,

—against—

WILLIAM H. DENTZER, individually and as Superintendent of the Banking Department of the State of New York,

Defendant-Appellee,

BENEFICIAL FINANCE COMPANY OF NEW YORK, INC., and PROTECTIVE LOAN CORPORATION,

Defendants-Appellants.

Before:

KAUFMAN, *Chief Judge,*
MANSFIELD and MULLIGAN, *Circuit Judges.*

Appeal from judgment entered in the United States District Court for the Northern District of New York, James T. Foley, *Judge,* declaring N.Y. Pers. Prop. Law §§ 46-49 (McKinney Supp. 1973) unconstitutional as being violative of Due Process, and enjoining defendants from enforcing wage assignments in accordance with these provisions.

Reversed.

PHILIP G. SCHRAG, New York, N.Y. (Joel F. Spitzer, The Legal Aid Society of Albany, Inc., Albany, N.Y., of Counsel), *for Plaintiffs-Appellees.*

JOHN T. DEGRAFF, Albany, N.Y. (William H. Allen, Eugene D. Gulland, Washington, D.C., for Beneficial Finance Company of New York, Inc.; Harvey M. Lifset, Albany, N.Y., for Protective Loan Corporation, on the brief) (DeGraff, Foy, Conway & Holt-Harris; Covington & Burling, of Counsel), *for Defendants-Appellants.*

JACK GREENBERG & ERIC SCHNAPPER, NAACP Legal Defense & Education Fund, Inc., New York, N.Y., *for Amicus Curiae.*

BERNSTEIN, SEAWELL, KAPLAN & BLOCK, New York, N.Y. (Frederick H. Block, Harvey N. Goldstein, of Counsel), *for Household Finance Corporation, Amicus Curiae.*

MULLIGAN, *Circuit Judge:*

On October 12, 1970, the plaintiffs brought an action in the United States District Court for the Northern District of New York against Beneficial Finance Company of New York, Inc. and Protective Loan Corporation, as well as the Superintendent of the Banking Department of the State of New York, seeking, *inter alia*, a declaration that the N.Y. Pers. Prop. Law Art. 3-A (McKinney 1962), as amended, (McKinney Supp. 1973), and the N.Y. Banking Law Art. 9 (McKinney 1971) are unconstitutional. The corporate defendants are loan companies licensed by the Banking Department pursuant to Article 9 of the Banking Law, to engage in the business of making small loans.

The plaintiff Dorcas Bond executed a wage assignment as security for a loan of money from the defendant Beneficial. She used the money to purchase a washing machine from a third party. Since the machine proved defective, she decided that she was no longer bound to make loan repayments. On or about September 1, 1970, Beneficial determined that she was in default and a copy of her wage assignment was filed with her employer. The plaintiff claims that she received no prior notice of the creditor's intent to enforce the assignment. The employer took no action since Bond was no longer in its employ. Beneficial agreed not to seek enforcement of the assignment pending resolution of this suit.

The plaintiff Barbara Baldwin also executed an assignment of wages as security for a loan of money from the defendant Protective. On or about September 1, 1970, Protective determined that she was in default and caused a copy of the wage assignment to be served upon her employer. Baldwin makes the claim that she did not receive prior notice of the assignment and further claims that she has good and sufficient defenses, including fraud and deceit, to bar the enforcement of the assignment. Baldwin's employer did deduct 10 percent of her gross weekly income and paid it to Protective until November 2, 1970, when Protective agreed not to enforce the assignment pending a final judgment in this case.

In the action below, plaintiff moved for the convening of a three-judge court under 28 U.S.C. §§ 2281 & 2284, and also sought permission to prosecute the suit as a class action. On April 19, 1971, the Hon. James T. Foley, United States District Court Judge, Northern District of New York, in an opinion reported at 325 F. Supp. 1343, denied the motion for the convening of the three-judge court, finding that the Superintendent of Banking had no responsibility for the enforcement of Article 3-A of the Personal

Property Law, which is the basic codification of the law of wage assignments in New York. He found no interrelationship between that statute and Article 9 of the Banking Law under which the corporate defendants were licensed. He also denied the request for class action status on the ground that there were numerous institutions using wage assignments in addition to the two named defendants, and also because there could be a wide factual variance in the claims of debtors. Plaintiffs then sought a writ of mandamus from this court to compel the district court to convene a three-judge court and to permit the case to proceed as a class action. This court denied the petition by order dated May 14, 1971. (Docket No. 71-1467).

On July 25, 1973, the district court granted the plaintiffs' motion for summary judgment and denied the defendants' motion to dismiss. 362 F. Supp. 1373. In addition to finding state action within the meaning of 28 U.S.C. § 1343 and 42 U.S.C. § 1983, the court determined that sections 46-49 of Article 3-A of the Personal Property Law were unconstitutional on their face and as applied insofar as they provided for execution against wages by service of a wage assignment upon an employer without meaningful notice to the assignor and without an opportunity for him to be heard. They were deemed to be violative of the Due Process Clause of the Fourteenth Amendment. Finding no state action, we reverse.

It is not and cannot be disputed that the Fourteenth Amendment applies only to action by the State and not to action which is private. The "action" found offensive below is the filing of the wage assignment by the defendants with the employers of the plaintiffs, which they claim gives creditors the power to unilaterally decide when a debt exists and default occurs, thus precluding the debtor from effectively and realistically challenging the determination before the creditor takes the wages. If this action is pri-

vate, we need not reach the merits of the due process question.

Concededly, there is no participation here by any state officer or agent, which serves to distinguish this case from both *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337 (1969) (*ex parte* issuance of a summons by a court clerk pursuant to a Wisconsin statute authorizing prejudgment wage garnishment), and *Fuentes* v. *Shevin*, 407 U.S. 67 (1972) (replevin by summary writs issued by state courts and executed by state officials). The only state officer sought to be joined here, the Superintendent of Banks, was properly dismissed as a defendant by the court below in its order of April 19, 1971, since he plays no role whatever in the implementation of the wage assignment provisions of Article 3-A of the Personal Property Law.

The district court, however, found that "state action" could be bottomed on three principles which we will examine.

1) Partnership

The court below, relying upon *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961), found that state action exists here because the State has become a partner or a joint venturer with the creditor finance companies. In *Burton*, a restaurant, privately owned but open to the public, refused to serve a Negro only because of his color. The restaurant was located in a building owned by a state-created parking authority and leased from the authority. Aside from the offensiveness of the conduct involved, the State had provided the property where it occurred. This type of state participation is not present here. The loan companies are not the recipients of state aid by grant or loan and their facilities are privately owned. The "entwinement" cases, of which *Burton* is the prototype, represent generally cases of direct government subsidization, by

grant or loan, of otherwise private institutions. They represent factual patterns so much at variance with the facts in this case that any further discussion of them is not fruitful here.[1]

The court below also found a partnership to exist, apparently on the basis of the state licensing regulation which, it opined, gives "private interests . . . such economic advantages that they become business partners with the state in the regulation." 362 F. Supp. at 1378. While the district court found no inconsistency between this view and *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163 (1972), our recent opinion in *Wahba* v. *New York University*, —— F.2d ——, ——, slip op. 1693, 1701-02 (Feb. 11, 1974) indicates otherwise. Judge Friendly there noted:

> The Court in *Moose Lodge* could not have meant the reference to partners or joint venturers to be satisfied with some commonalty of economic interests *simpliciter*, since as a comment has pointed out, *The Supreme Court 1971 Term*, 86 Harv. L. Rev. 1, 73-74 (1972), such interests existed in a substantial degree in that case itself. The lodge received from the state permission to operate a lucrative business and obtained a valuable property right in the liquor license itself; the state, operating a monopoly system, was provided with a distributor that produced substantial revenue.

The State here does not receive any revenue from the licensing of lenders, and the finance companies, in any event, do not enjoy any monopoly in the lending of money on the security of wage assignments. Banks, trust com-

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1 See, e.g., *Wahba* v. *New York University*, —— F.2d ——, slip op. 1693 (2d Cir. Feb. 11, 1974); *Grafton* v. *Brooklyn Law School*, 478 F.2d 1137 (2d Cir. 1973); *Male* v. *Crossroads Associates*, 469 F.2d 616 (2d Cir. 1972).

panies and credit unions are authorized to loan money on such security and in fact are not required to comply with all the restrictions on wage assignments imposed by Article 3-A of the Personal Property Law. See N.Y. Pers. Prop. Law § 49 (McKinney 1962). Judge Mansfield's decision in *Seidenberg* v. *McSorleys' Old Ale House, Inc.*, 317 F. Supp. 593 (S.D.N.Y. 1970), also relied upon below, dealt with a restaurant which engaged in discriminatory practices and was dispensing liquor to the public, a business which could only be conducted by obtaining a liquor license from the State and the control of which by the State was found to be pervasive. Moreover, the sale of liquor produced tax revenue for the State. The mere fact that the defendants here have operated under a license issued pursuant to Article 9 of the Banking Law is surely no reason to find state action. As we have pointed out in a comparable situation: "[t]his is true also of every corporation chartered under a special or even a general incorporation statute, and not even those taking the most extreme view of the concept have ever asserted that state action goes that far." *Powe* v. *Miles*, 407 F.2d 73, 80 (2d Cir. 1968). The requisite state action must be related to the challenged activity. *Shirley* v. *State Nat'l Bank*, —— F.2d ——, ——, slip op. 1773, 1780 (2d Cir. Feb. 14, 1974). Moreover, as we will discuss in Part 2 of this opinion, the regulation provided by both Article 3-A of the Personal Property Law and Article 9 of the Banking Law, is conspicuously and designedly for the benefit of the borrower and not the lender.

The third alleged basis of state "partnership" found below is the "silent" partnership of the judicial branch of state government "using its power to further the acts of private interests which deprive a person of constitutional rights." 362 F. Supp. at 1378. The court cited *Shelley* v. *Kraemer*, 334 U.S. 1 (1948) and *Brinkerhoff-Paris Trust & Savings Co.* v. *Hill*, 281 U.S. 673 (1930), neither one of

which has any relevance here as far as we can see. In *Shelley*, the Supreme Court did find state action when state courts enforced offensive, racially discriminatory restrictive covenants. Here, however, no state court has precluded the debtors from doing anything. The gist of the claim is that the wage assignment agreement permitting the unilateral action of the creditor is sanctioned by the state legislature. It is the purported circumvention of the courts which is complained of and not their intrusion. *Brinkerhoff-Faris Trust & Savings Co.* is equally inapposite. There, state action was found when a state court, overruling its own prior decisions, deprived a claimant, without adequate notice, of his right to contest a discriminatory state tax. Here, of course, no decision of any state court has denied the plaintiffs of any right to be heard.[2]

2) Encouragement

The court below found encouragement by the State of New York and thus state action because the statutory scheme of Article 3-A of the Personal Property Law "commands" the procedures that purportedly deprive the plaintiffs of their constitutional right of due process, *i.e.*, the right to a hearing before the wages are attached. 362 F. Supp. at 1179. The argument made here is similar to that made by the plaintiffs and rejected by this court in *Shirley* v. *State Nat'l Bank, supra.* The State in this case has not deprived the plaintiffs of anything. They have entered into

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2 Although N.Y. Pers. Prop. Law § 47-e (McKinney Supp. 1973) provides that "[a]n assignment may be vacated by a judgment of a court of record upon a special proceeding brought by the assignor, his employer or any person having an interest therein," the plaintiffs have never sought such relief. The defendants here have commenced an action in the New York Supreme Court, Albany County, against the plaintiffs seeking a declaratory judgment as to the meaning of various provisions of Article 3-A and their constitutionality, but there has been no final decision in that case.

agreements with the defendants in which they have secured funds on the distinct understanding that if there is a default on the loan, the creditor may attach and collect a percentage of the debtor's wages. It was ever thus. A lender who advances money without any security except the fact that his debtor is employed, expects to be able to have access to the security without the necessity of commencing a law suit to establish the debt. No one has cited here nor have we found any case in this State which, prior to the enactment of Article 3-A of the Personal Property Law, found that the assignment was unenforceable unless the debt were first judicially established. The statute therefore does not take away something which previously existed. In fact, section 47-e of the Personal Property Law creates an action for the debtor if he wishes to contest the debt, and it is not argued that any such action existed at common law.

The argument is raised that since the wage earner is impecunious and is at the mercy of the finance corporation, the contract which he formally enters into is a contract of "adhesion" and presumably is to be disregarded. We, of course, agree that those who have no other security to offer but wages represent overwhelmingly that segment of the population which is at the lower rungs of the economic ladder. This is precisely why the State of New York has legislated. Absent the wage assignment device, the poor are left to the tender ministrations of the loan sharks, whose rates of interest and methods of enforcement are well understood by this court and anyone who reads its opinions or even the pages of the public press. Present Article 3-A was the product of a New York State Law Revision Commission Study and Recommendation. The policy of the State was revealed in the Commission Recommendation (1950 N.Y. Legis. Doc. No. 65(A)) is manifest. The State is concerned that the poor, who often have no other

security but wages, have access to credit without resorting to loan sharks, and at the same time the State wishes to protect the debtor from overreaching. The safeguards afforded the debtor by the challenged Article are numerous.

Section 46-c(a) provides that the assignment shall be made in a separate written instrument in which all printed material is in at least eight point type, with the title "Assignment of Wages, Salary, Commissions or other Compensation for Services" in ten point bold type. Subsection (b) requires that the transaction to which the assignment relates be described fully, including the name and address of the assignee, the consideration given, and the date and place at which payments are to be made. On the face or back of the instrument there must be a summary of sections 46-c, 46-e, 46-f, 48, 48-a, 48-b, 48-c and 49 of the Article.[3]

Section 46-e invalidates an assignment unless it is personally executed by the assignor and copies of the assignment and attached papers are delivered to the assignor.

Section 46-f limits the amount of interest collectable on a loan and bars other charges disguised as investigative costs or charges for the drawing of papers. Violation of this section is a misdemeanor.

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3 We have noted that section 47-e, providing for the vacation of wage assignments, is absent from the list of sections required to be printed in the agreement. Our review of the legislative history has revealed no reason for this omission, and it may well have been due to inadvertence in view of New York's exhibited concern that debtors be afforded a swift and meaningful remedy for vacating invalid assignments. New York adopted remedial legislation establishing a simplified procedure for vacation as early as 1941. See Law of April 28, 1941, ch. 867, [1941] N.Y. Laws 164th Sess. 1977; *Sheer* v. *Family Finance Corp.*, 46 N.Y.S. 2d 398 (Sup. Ct. 1944). When this did not prove sufficient to protect the rights of debtors, the New York Legislature acted in 1960 to correct what the Governor characterized as "defects" in the prior law. Message of the Governor, 1960 McKinney Sess. Laws of N.Y. at 2010. In any event, plaintiffs do not consider that the section 47-e action provides "Due Process."

Section 47 mandates filing of the assignment with the county clerk before it is filed with the assignor's employer.

Section 47-d provides for a certificate of cancellation upon the payment of the debt.

Section 47-e provides for the vacation of an assignment upon application of the assignor, his employer or any person having an interest by court order in a special proceeding.

Section 48 requires that an assignee of future earnings wait 21 days after default by the assignor, notify the assignor of the default and wait another 10 days before filing the assignment with the employer.

Section 48-a limits the amount collectable in any month to no more than 10 percent of the assignor's future earnings payable in such month.

Section 48-b prohibits the withholding of earnings unless such earnings amount to at least the sum of 30 dollars per week if the assignor is employed in a city of 250,000 or more and 25 dollars per week elsewhere.

It is abundantly clear that Article 3-A was primarily concerned with the protection of the wage earner-assignor and that its provisions were designed, not to encourage the assignment of wages, but to discourage the overreaching of the wage earner. The fact that the statute provides that only wage assignments made pursuant to Article 3-A are collectable is merely a recognition of what had been true at common law before the statute was enacted, except that procedural and substantive safeguards were provided to protect the wage earner from loan shark techniques. The protection of the wage earner against the avarice of the finance company is further attested by the provisions of Article 9 of the Banking Law.[4]

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4 "The purpose of [Article 9] is to protect from exorbitant and unconscionable demands the poor and needy who are compelled to borrow

In this context, the phrase "contract of adhesion" becomes meaningless. In view of the admittedly unequal bargaining position of the parties, the impoverished debtor is not subjugated to the whim of the creditor—the terms of the agreement are fixed by the State which has equalized the bargaining posture of the borrower. See generally Kessler, Contracts of Adhesion — Some Thoughts about Freedom of Contract, 43 Colum. L. Rev. 629 (1943).

The argument is made on this appeal that by the very existence of Article 3-A, the wage assignment device is sheltered from attack by the courts, by local legislative bodies and by an "evolving pattern of industrial conduct." In short, the fact that the State has enacted legislation,

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small sums to meet a pressing necessity. London Realty Co. v. Riordan, 207 N.Y. 264, 269, 100 N.E. 800 . . . . " *Hennessey* v. *Personal Finance Corp.*, 176 Misc. 201, 204, 26 N.Y.S. 2d 1012, 1016 (Sup. Ct. 1941). See also *In re Eadner*, 36 F. Supp. 964 (S.D.N.Y.), aff'd, 124 F.2d 143 (2d Cir. 1941).

Section 340 requires that persons and organizations in the business of making small loans obtain from the Superintendent of Banks a license which subjects them to the regulatory provisions of Article 9. (Prior to 1973 small loans were those amounting to 1400 dollars or less; the sum has now been raised to 2500 dollars). Section 343 provides the conditions under which a license may be issued, including a finding by the Superintendent "that the financial responsibility, experience, character, and general fitness of the applicant . . . are such as to command the confidence of the community and to warrant belief that the business will be operated honestly, fairly, and efficiently . . . . " Licensees are required to maintain books and records (§ 350) and the Superintendent is authorized to make investigations at any time, and at least once annually, to assure compliance with the Article. § 349. Non-compliance may result in the revocation of the license. § 348.

Many violations of Article 9 are penal and void the loan. § 358. Section 352, for example, forbids devices to split loans to secure higher interest rates than those set by the Article and prohibits deduction of interest in advance and the compounding of interest. Section 356, which is the only section in Article 9 directly related to wage assignments, invalidates an assignment where the loan is not paid to the borrower simultaneously with the execution of the assignment and limits any levy under the assignment to 10 percent of the assignor's wages at the time they are payable.

per se, creates "state action." Appellants argue that *Reitman* v. *Mulkey*, 387 U.S. 369 (1967), presents a precise parallel. We cannot agree.

Reitman involved an amendment to the California State Constitution, Proposition 14, which banned the State from imposing any limitation on the right of a person to dispose of his real property. The amendment, in effect, created a state constitutional right to discriminate, repealing prior acts of the state legislature which had regulated racial discrimination in housing. The Supreme Court held that this effectively constituted state action which encouraged racial discrimination. Mr. Justice White pointed out in his opinion for the Court:

> Private discriminations in housing were now not only free from [the regulatory statutes] but they also enjoyed a far different status than was true before the passage of those statutes. The right to discriminate, including the right to discriminate on racial grounds, was now embodied in the State's basic charter, immune from legislative, executive, or judicial regulation at any level of the state government. Those practicing racial discriminations need no longer rely solely on their personal choice. They could now invoke express constitutional authority, free from censure or interference of any kind from official sources.

387 U.S. at 377.

The distinction between *Reitman* and the present case is clear. In *Reitman*, the amendment encouraged discrimination by repealing prior law and by greatly inhibiting any subsequent change. See Black, The Supreme Court, 1966 Term, Forward: "State Action," Equal Protection, and California's Proposition 14, 81 Harv. L. Rev. 69, 74-75 (1967). Article 3-A was not regressive in the field of

debtors' rights and there is no constitutional immunization from further change. Clearly, the New York Legislature is still free to act and indeed it has acted to prohibit wage assignments in certain cases.[5] The argument that Article 3-A is immunized from attack by state courts and local agencies, and that this constitutes state action, is not persuasive. All legislative expressions of public policy prevent courts from reaching contrary conclusions. Moreover, any state statute which preempts a field precludes local agency legislation. See, e.g., *Myerson v. Lentini Bros. Moving & Storage Co.*, 171 N.Y.L.J., Jan. 25, 1974 at 1, col. 7 (N.Y. Ct. App. Dec. 27, 1973). Thus the argument, followed to its logical conclusion, would provide an omnibus basis for finding encouraging state action simply because of the fact of legislation. We implicitly rejected such a concept in *Shirley* v. *State Nat'l Bank, supra,* in which we dealt with a Connecticut codification of the common law right of self-help repossession in conditional sales transactions. What we said there is equally applicable here:

> Codification did not encourage the practice one whit. As we have pointed out, the legislation made it less attractive by providing greater safeguards . . . .

—— F.2d at ——, slip op. at 1782. The argument that the Article shelters the wage assignment device from an evolving pattern of industrial and commercial conduct, has the virtue of novelty but again has no basis in reality or logic. Cf. *Lucas* v. *Wisconsin Elec. Power Co.*, 466 F.2d 638, 657 (7th Cir. 1972), cert denied, 409 U.S. 1114 (1973). Judge Foley in his memorandum decision and order filed April 19, 1971, denying plaintiffs' motion to

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5 See N.Y. Pers. Prop. Law § 413(10)(b) (McKinney Supp. 1973), which precludes the inclusion of a clause in a retail instalment credit agreement providing for the assignment of wages.

convene a three-judge court and granting the defendants' motion to dismiss the class action sought to be maintained, stated:

> Further, if this New York statute is deficient, or not clear in its wording to prevent the injustice claimed by plaintiffs, then a common sense way to correct it would be to interest the Legislature of New York to change or improve the wording to embrace for court consideration fraud in lending and taking of the assignment. The Attorney General of New York has been foremost in the Nation in the creation of bureaus and divisions in his office that police and act upon grievances of this kind. No policy by any lawyer or group of lawyers seems sensible that bypasses these channels that might easily correct and avoid the filing of these obvious burdensome suits in federal or state courts. Relief from hardships imposed by State statute is the responsibility of a state legislature unless some constitutional right is infringed. (Nelson v. New York City, 352 U.S. 103, 110-111).

325 F. Supp. at 1351-52. We are inclined to agree that the Attorney General of the State of New York and the New York State Legislature are perfectly competent to recommend and to effectuate statutory changes to succor the credit consumer. The continuing amendments to Article 3-A indicate a liberal and sympathetic attitude.[6] We do

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6 Although wage assignments were well known in New York before the adoption of Article 3-A of the Personal Property Law (see *Field* v. *New York*, 6 N.Y. 170 (1852); *Continental Purchasing Co.* v. *Van Raalte Co.*, 251 App. Div. 151, 295 N.Y.S. 867 (4th Dep't 1937); 3 Williston, Contracts § 413 (3d ed. 1960)), "[w]age assignments are not favored by New York Courts. In re Jones' Claim, 19 A.D. 2d 330, 242 N.Y.S. 2d 1004, aff'd 14 N.Y. 2d 558, 248 N.Y.S. 2d 652, 193 N.E. 2d 40. The legislature has surrounded such assignments of future earnings

not flinch from an inquiry into the due process issue, but under constitutional principles enunciated by the Supreme Court, we must first find state action, and we see no parallel to *Reitman* in the "immunization" argument made on this appeal.

3) Traditional State Functions

The final basis for state action urged here is that when a private person is performing, pursuant to a right accorded by statute, a function traditionally performed by the State, the acts of the individual may be described as state action. The difficulty with this position is that the legislation does not vest the assignee with any function traditionally performed by the State. The function of the wage assignment has always been that of a private levy without a prior court order. There was never any requirement or practice that has been called to our attention which mandated the creditor to first establish the debt before attaching the wages and which the State has now abrogated. In fact, as our prior discussion indicates, the State has created a right on the part of the debtor to question the debt by initiating an action which was not known at common law. In sum, the statute has not given the assignee anything new; it has in fact circumscribed substantially the rights of the creditor which were untrammeled at common law.

Our analysis of the involvement of the State of New York in the wage assignment device compels the conclusion that the legislature has not intruded at all into the so-called offensive conduct complained of here, but rather has regulated the terms of the arrangement to prevent

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with closely regulated conditions for the protection of the wage earner and his family. Personal Property Law Art. 3-A." *Roy Bills Finance Corp. v. Mead*, 60 Misc. 2d 1051, 1052, 304 N.Y.S. 2d 356, 357 (Sup. Ct. 1969).

the gouging of the impecunious. Article 3-A of the Personal Property Law, as well as Article 9 of the Banking Law, reveals a clear legislative concern to protect the necessitous from the loan shark by setting maximum interest rates and the maximum amount of the levy, and by otherwise assuring that the borrower be equitably treated. Even the size of the print in the agreement is fixed by statute. We are frankly loathe to interfere with this legislative judgment which represents years of measured policy making. It may be, as defendants urge, that a requirement that plenary suit first be brought will either jeopardize the marketing of such credit or result in increased costs which can only add further to the burdens upon those already financially embarrassed.

The failure of the State to mandate a plenary action to establish the debt when none has ever been required by case law and is not required by the agreement, constitutes not only an absence of state action but also cannot be properly characterized as offensive or shocking. If the borrower uses funds to buy merchandise from a third person which proves to be defective, we are at a loss to understand how this provides him any excuse for failure to pay the loan as agreed. Yet, the plaintiff Bond claims that her constitutional rights are infringed since the defendant Beneficial is not required to sue her to establish the debt so that she can present the defense of breach of warranty. Both plaintiffs claim that the defendants were guilty of fraud and deceit without any particularization or suggestion of what this may be. In view of the detailed statutory safeguards we have discussed, it is difficult to imagine what kind of fraud or deceit could be established in a transaction, the terms of which by and large are predetermined by statute. The claim of failure to notify the plaintiffs of the filing of the assignment with the em-

ployer is moot in the case of Bond and is controverted in the case of Baldwin.

Judge Friendly, writing for this court in *Wahba* v. *New York University, supra,* observed that the finding of state action "hinges on the weighing of a number of variables, principally the degree of government involvement, the offensiveness of the conduct,[7] and the value of preserving a private sector free from the constitutional requirements applicable to government institutions." —— F.2d at ——, slip op. at 1703-04 (footnote added). Here, we find no state action since there is no significant involvement of the State in the challenged conduct. Moreover, the statutory scheme under attack reveals not an offensive or insensitive attitude, but rather one of understanding and beneficence toward the borrower. The State has sought to preserve and to insure that the needy have recourse to legitimate outlets of credit.

Reversed.

KAUFMAN, *Chief Judge* (Dissenting):

After reading my brothers' opinion as a sequel to *Shirley* v. *State Nat'l Bank,* —— F.2d ——, slip op. at 1773 (2d Cir. Feb. 14, 1974), I can at least applaud them on their consistency. But, my views too are well known. I stated

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7 We noted in *Shirley* v. *State Nat'l Bank,* —— F.2d ——, ——, slip op. 1773, 1782-83 (2d Cir. Feb. 14, 1974) that this court has frequently indicated that the resolution of the state action question reached in a case involving racial discrimination may well and properly differ from that adopted in other contexts. *United States* v. *Wiseman,* 445 F.2d 792, 795 n.3 (2d Cir.), cert. denied, 404 U.S. 967 (1971); *Lefcourt* v. *Legal Aid Society,* 445 F.2d 1150, 1155 n.6 (2d Cir. 1971); *Powe* v. *Miles,* 407 F.2d 73, 82, 85 (2d Cir. 1968); *Wolin* v. *Port Authority,* 392 F.2d 83, 89 (2d Cir.), cert. denied, 393 U.S. 940 (1967).

in *Shirley* v. *State Nat'l Bank, supra,* —— F.2d at ——, slip op. at 1784 (Kaufman, *C.J.* dissenting):

> I am of the view that the lawful non-consensual taking of property is a uniquely governmental function, (and therefore) I consider its exercise, whether by state officials or by private individuals so empowered, subject to the due process constraints functionally required to avoid arbitrary deprivations.

The device of wage assignment—no matter how old, how sacred, how firmly embedded in our common law tradition —rests nevertheless on the private implementation of the state's monopoly power over binding conflict resolution. When a finance company unilaterally determines that the assignor-debtor is in default, the essential predicate for triggering the wage assignment mechanism—and then takes the drastic step of seizing a significant property interest without the consent of the holder—it is performing an adjudicative function which is a fundamental component of the role of government in our society.

Appellants urge, however, and the majority agrees, that this delegation of power to the private sector—this waiver, in effect, of the debtor's constitutional right to have default determined under the aegis of government, with the procedural requirements attendant thereto—is sanctified by the consensual nature of the wage assignment agreement. Yet, the language of these agreements includes no mention of the procedural safeguards the debtor is asked to relinquish. Thus, my comment in *Shirley* v. *State Nat'l Bank, supra,* —— F.2d at ——, slip op. at 1783 n. 1 (Kaufman, *C.J.* dissenting), applies with equal force here:

> As in *Fuentes* v. *Shevin,* 407 U.S. 67, 94-96 (1972), the fact that the plaintiff signed a form contract which authorized (wage assignment) will not immunize a

> seizure, under a waiver theory, where it is otherwise defective because the (wages are) seized without prior notice and an opportunity for a hearing. The absence of consent in the taking cannot be cured by resorting to the meaningless ritual of utilizing a contract of adhesion in which the fine print, even if read, fails to mention that the debtor has any right to a pre-seizure hearing.

Moreover, try as I might I cannot fathom how the majority finds comfort in Professor Kessler's commentary on the now vacuous concept of freedom of contract—rendered an anachronism by the advent of the adhesion contract. Indeed, the author captures the very essence of the delegation of power principle by which so-called private conduct is infused with "state action."

> Society, by proclaiming freedom of contract, guarantees that it will not interfere with the exercise of power by contract. Freedom of contract enables enterprisers to legislate by contract and, what is even more important, to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms. Standard contracts in particular could thus become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals.

F. Kessler, Contracts of Adhesion—Some Thoughts About Freedom of Contract, 43 Colum. L. Rev. 629, 640 (1943) (footnote omitted). It strikes me as rather fatuous to argue, as the majority does, that "the phrase 'contract of adhesion' becomes meaningless . . . (because) the impoverished debtor is not subjugated to the whim of the creditor" when perhaps the most critical and certainly the most

self-serving determination in the debtor-creditor relationship—default—is left by contract to the creditor, ex parte.

Indeed, by following the "consensual" path hewn by the majority, we go far toward eviscerating the salient teaching of *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337, 340 (1969) concerning the injustices which arise from "prejudgment garnishment whereby the sole opportunity to be heard comes from the taking." To be sure, my brothers have no difficulty whatsoever with *Sniadach* and with a mere nod they indicate their awareness of its existence. They then proceed to distinguish *Sniadach* from this case by noting the absence here of the court clerk's purely ministerial role in *Sniadach* in issuing the ex parte summons. Meaningless distinctions of this sort are intended to give the appearance of continuity of the law, when in fact the majority here has clearly parted company with the Supreme Court's rationale in *Sniadach* and *Fuentes*. It can hardly be questioned that the result of the filing of the wage assignment in this case was the equivalent in its effect to the garnishment proceedings in *Sniadach*. If the debtor's consent to the wage deprivation is not meaningful, as it cannot be without at least an understanding of the procedural shortcuts which follow wage assignment, *compare Swarb* v. *Lennox*, 405 U.S. 191 (1972) *with D. H. Overmyer* v. *Frick Co.*, 405 U.S. 174 (1972), then that "consent" serves merely to camouflage the taking. The words of the Court, though uttered in a different context, are strikingly appropriate:

> To hold otherwise would be to exalt artifice above reality and to deprive the (decision in *Sniadach*) of all serious purpose.

Gregory v. *Helvering*, 293 U.S. 465, 470 (1935).

Nor can New York's wage assignment statute be cleansed of its constitutional impurities by relying on the benevolence

of the New York legislature in promulgating it. The Court, in *Sniadach*, was quite explicit about the relevance of good intentions:

> The question is not whether the Wisconsin law is a wise law or an unwise law. Our concern is not what philosophy Wisconsin should or should not embrace. (citation omitted). We do not sit as a super-legislative body. In this case the sole question is whether there has been a taking of property without that procedural due process that is required by the Fourteenth Amendment.

Sniadach v. *Family Finance Corp., supra,* 337 U.S. at 339.

Accordingly, since I find the requisite "state action" in the appellants' performance of the uniquely public function of adjudication,[1] and because the § 47-e "special proceeding" requires initiation by the debtor, a burden we have found constitutionally impermissible in our recent decision, *Hernandez* v. *European Auto Collision, Inc.*, 487 F.2d 378, 385 n. 4 (Timbers, *J.* concurring in an opinion joined by Lumbard, *J.*), I would affirm Judge Foley's decision—a well reasoned and sound analysis of the law.

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1 I fail to understand the majority's reliance on Judge Friendly's three-pronged test in *Wahba* v. *New York University*, —— F.2d ——, ——, slip op. 1693, 1703-04. It has no relevancy to this case since, unlike *Wahba*, a finding of "state action" here would not turn on the applicability of the "partnership" or "symbiosis" test.

Order Denying Rehearing

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 29th day of March, one thousand nine hundred and seventy-four.

73-2377

DORCAS BOND and BARBARA BALDWIN, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

—v.—

WILLIAM T. DENTZER, individually and as Superintendent of the Banking Department of the State of New York,

Defendant,

BENEFICIAL FINANCE COMPANY OF NEW YORK, INC. and PROTECTIVE LOAN CORPORATION,

Defendants-Appellants.

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellees, a poll of the judges in regular

active service having been taken and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Chief Judge KAUFMAN, *Judges* FEINBERG and OAKES dissent.

IRVING R. KAUFMAN
Chief Judge